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No. 87-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

WILLISTON BASIN INTERSTATE PIPELINE COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATEMENT OF THE CASE

Respondent Williston Basin Interstate Pipeline Company ("WBI") submits this memorandum pursuant to Rule 19.6 of the Rules of this Court in support of the petition by ARCO Oil and Gas Company, Division of Atlantic Richfield Company ("ARCO"), for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia in this case. WBI is an interstate pipeline which purchases natural gas from ARCO, among other suppliers, for delivery to the citizens of Wyoming, Montana, and North and South Dakota[1].

1 WBI is a wholly owned subsidiary of and, as of January 1, 1985, successor in interest to MDU Resources Group with respect to a contract to purchase natural gas from ARCO. WBI has no subsidiaries of its own. For convenience, both companies are referred to herein as WBI.

The Court of Appeals held, *sua sponte*, that it lacked jurisdiction of WBI's petition to review Order Nos. 338, 48 Fed. Reg. 46,268 (Oct. 12, 1983), FERC Statutes and Regulations (CCH) ¶ 30,505 (1983), and 338-A, 33 FERC (CCH) ¶ 61,175 (1985), of the Federal Energy Regulatory Commission ("FERC") designating certain overlapping rock formations in Wyoming known as the Dakota Group as "tight formations," thereby allowing ARCO to obtain higher prices from WBI under Section 107 of the Natural Gas Policy Act of 1978 ("NGPA")[2] for natural gas produced from those formations. As discussed below, WBI believes that the Court should issue a writ of certiorari because of the important issues this case presents for the administration of the NGPA. By holding that it lacked jurisdiction to review the subject orders, the Court of Appeals failed to correct FERC's arbitrary and capricious approach to administering that statute—an approach directly contrary to the intent of Congress and to the public interest.

Section 107 of the NGPA permitted FERC to prescribe higher prices for gas *only* "to the extent that such special price is *necessary* to provide reasonable incentives for the production of such high cost natural gas." 15 U.S.C. § 3317(b) (emphasis added). WBI contended in the Court of Appeals that the FERC orders at issue were arbitrary and capricious because they were based on the rote application of generic criteria established in 1980 by FERC Order Nos. 99 and 99-A[3] for the designation of tight formations despite (a) overwhelming evidence that, as FERC itself had repeatedly acknowledged, market conditions had changed drastically; (b) FERC's own determination that prices in excess of the commodity value of gas, because of their adverse impact on consumers, were

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2 15 U.S.C. § 3317(c)(5) (1982). The NGPA was enacted into law by Pub. L. 95-621.

3 *Regulations Covering High-Cost Natural Gas Produced From Tight Formations*, Order No. 99, 45 Fed. Reg. 56,034 (Aug. 22, 1980), FERC Statutes and Regulations (CCH) ¶ 30,183 (1980), *reh'g denied, Order Denying and Clarifying Order No. 99*; Order No. 99-A, 45 Fed. Reg. 71,563 (Oct. 29, 1980), FERC Statutes and Regulations (CCH) ¶ 30,198 (1980), *aff'd Pennzoil v. FERC*, 671 F.2d 119 (5th Cir. 1982).

"contrary to the public interest"; and (c) clear evidence that, because ARCO would have obtained a substantial profit even without incentive pricing, a special price was not "necessary to provide reasonable incentives" to ARCO for production of gas from the formations, as the enabling statute required. By reaching out to hold, through a convoluted and erroneous assessment of legislative intent, that it lacked jurisdiction of WBI's claims, the Court of Appeals failed to correct, as the decisions of this Court require, the action of an agency which ignored essential facts, its statutory mandate, and its own assessment of the public interest in issuing the subject orders.

1. The Regulatory Background

In passing the NGPA, Congress sought to encourage natural gas exploration through incentive pricing while mitigating the consumer impact of the higher prices. Section 107 of the statute authorized FERC to prescribe, by rule or order, a maximum price above the otherwise lawful maximum price for five specified categories of natural gas, "to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas." 15 U.S.C. § 3317(b). Among other things, § 107 permitted incentive pricing for natural gas produced under such conditions as FERC "determines to present extraordinary risks or costs." *Id.* § 3317(b)(5). The decision as to whether gas was produced under such conditions was left to the discretion of FERC.

FERC exercised the discretion afforded it by Congress by promulgating a series of interim regulations in Docket No. RM 79-76 which culminated in Order Nos. 99 and 99-A, establishing an incentive maximum lawful price for certain natural gas produced from "tight formations," *i.e.*, formations in which the components of a sedimentary layer of rock are cemented together in a manner that greatly hinders the flow of gas. FERC established standards with respect to permeability and flow to be used to identify tight formations. Among other things, Order No. 99 provided a two step process for determining whether a producer was entitled to charge an increased price for tight formation gas. First, the geological formation

from which the gas emanated had to be designated by FERC as a "tight formation" ("tight formation designation" or "step one"). Second, FERC had to determine that surface drilling of the well from which the gas was produced began on or after July 16, 1979 ("well determination" or "step two").

2. FERC's Decision That the Procedures of § 503 of the NGPA Need Not Be Used for the Tight Formation Designation

Section 503 of the NGPA, 15 U.S.C. § 3413, sets forth a procedure whereby state and federal agencies with jurisdiction over the formation in question ("jurisdictional agencies") would determine initially whether natural gas was qualified to receive an increased price. Section 503 of the statute provides that the determinations of the jurisdictional agencies would become final, and thus not subject to judicial review, if not reversed or remanded by FERC within statutorily prescribed time periods. Section 503 further provides that FERC's review was limited to determining whether the jurisdictional agency's decision was based on substantial evidence. However, as early as February 1980, FERC put the industry on notice that § 503 prescribed the procedure and FERC's review authority only with respect to step two of the two step process, the well determination, and that it did not apply to step one, the tight formation designation. In Interim Rules issued on February 20, 1980, FERC limited the applicability of § 503 to well determinations. FERC determined that the § 503 procedure need not be used for the tight formation designation on the grounds that "Section 503 describes the Commission's review authority only with respect to well category [step two] determinations"; that "pursuant to Section 506 of the NGPA, the Commission has the authority to engage in any activity and to issue any rules it finds necessary to carry out its functions under the NGPA, including its functions under Section 107 . . . to identify gas which is produced under extraordinary risk or cost"; and that "[g]iven that function, and its authority

under Section 501 [rulemaking], the Commission is not constrained by Section 503."

In Order No. 99, issued in August 1980, FERC reaffirmed its position that, pursuant to its authority under § 506 of the NGPA, step one tight formation designations would be made through the rulemaking procedure under § 501, specifically rejecting, for step one designations, both automatic approval of jurisdictional agency recommendations and the use of the time periods and standard of review set forth in § 503. In Order No. 99-A, the Commission rejected an application for rehearing of Order No. 99 filed by Pennzoil Company, *et al.* which argued that the § 503 procedure should be used for the tight formation designation, stating:

> The Commission has the discretion to qualify tight formations under either Section 503 or by rulemaking. For the reasons enunciated in the preamble to the final rule, the Commission will continue to designate tight formations by rule in accordance with the provisions of § 271.703.

45 Fed. Reg. 71,563-64. As noted above, Order No. 99-A was affirmed by the Court of Appeals for the Fifth Circuit.

3. FERC Regulations for Tight Formation Designations Through § 501 Rulemaking

FERC promulgated regulations setting forth the procedures to be used for step one tight formation designations through § 501 rulemaking. The regulations provided, among other things, that the jurisdictional agencies would make initial written recommendations as to tight formation status which FERC could accept or reject in its rulemaking; that upon receipt of the jurisdictional agency's recommendation, FERC would publish in the Federal Register a notice of proposed rulemaking containing such recommendation and that, after considering any comments or information from interested parties, FERC would prescribe a rule approving or disapproving the recommendation. 18 C.F.R. § 271.703. Pursuant to

§§ 502 and 506 of the NGPA, 15 U.S.C. §§ 3412, 3416, the rulemaking procedure described above was subject to judicial review. For a period of approximately eight years, FERC designated tight formations (step one) only by rulemaking under Section 501 of the statute and used the procedures of Section 503 only for well determinations (step two).

4. The Jurisdictional Agency's Recommendation

On October 21, 1982, Minerals Management Service ("MMS"), a branch of the Department of the Interior which, because the Dakota Group formations are located on Indian land, was the jurisdictional agency responsible for those formations, submitted its recommendation to FERC that the formations be designated as "tight" formations. On November 22, 1982, pursuant to § 271.703 of its regulations, FERC published in the Federal Register a Notice of Proposed Rulemaking to determine whether MMS's tight formation recommendation should be approved.

In comments submitted in connection with FERC's proposed rulemaking, WBI asserted that no incentive pricing was needed to promote production of natural gas from the subject formations. Among other things, WBI called FERC's attention to the fact that the area encompassing the formations had already been substantially developed; that the existing wells were highly productive, with initially high and ever increasing flow rates; and that the economic risks involved in drilling the subject formations were virtually negligible because each of the last five wells drilled had been successful and had, in fact, already paid for itself (with the present and future revenues from production therefore being virtually all profit.)

5. FERC's Commodity Value Rulemaking

While the question of tight formation designation for the Frontier and Dakota Group formations was pending, FERC, on February 10, 1983, issued a Notice of Proposed Rulemaking on Limitation on Incentive Prices for High-Cost Gas to Commodity Values ("Incentive Limitation Notice") and invited

comments thereon. 48 Fed. Reg. 7469 (1983). FERC articulated its concern and the focus of its inquiry at pages 5-6 of the Incentive Limitation Notice:

> In 1980, at the time the Commission sought to maximize incentives for the production of high-cost gas in Order Nos. 99 and 107, it did so against a backdrop of rising oil prices, a stronger economy and relatively little experience with the effects of the NGPA on gas supplies and pricing. In the two years since that period, oil prices have declined in real terms and the economy has stagnated, resulting in substantially decreased demand for gas and all other fuels. At the same time, gas prices have risen steadily, due both to the pricing mechanisms built into the NGPA and the contracting practices of pipelines and producers.
>
> Currently, as a general matter, demand for natural gas at the end user level is falling, while gas prices have only slowly and reluctantly responded to the decreased demand. The pricing provisions of conventional gas purchase contracts do not permit downward pricing flexibility and market forces have not restrained producers from receiving the full ceiling prices established for high-cost gas under section 107(c)(5) and from receiving even higher prices for deregulated gas. At the same time, the delivered price for gas in many areas is now higher than the delivered price of competing fuels, and many distributors and pipelines claim to have lost industrial customers who can switch to cheaper No. 6 fuel oil. The result is still higher prices to residential and other customers who remain, since the transmission and distribution fixed costs are spread among fewer customers.
>
> *It is apparent, therefore, that the average price for gas has reached or exceeded market-clearing levels in some U.S. gas markets. It is also clear that the commission must now consider whether its own decisions in setting incentive ceilings under NGPA section 107(c)(5) are exacerbating the current gas pricing problems. The Commission be-*

lieves that a ceiling price in excess of the commodity value of gas, as measured by reference to the prices of competing fuels, is contrary to the public interest.

Id. (emphasis added) (footnote omitted).

6. FERC Order No. 338

Notwithstanding the concern articulated by FERC in the Incentive Limitation Notice that, contrary to public interest and to the policy underlying the NGPA, incentive pricing for tight formations was exacerbating gas price problems, on October 7, 1983, FERC issued Order No. 338 in which it approved the recommendation that the subject formations be designated tight formations eligible for incentive pricing. Without regard to the drastic change in market conditions in the three years since the issuance of that order and without regard to the need for or the impact of its action, FERC premised its tight formation designation on a rote application of the criteria set forth in Order No. 99: "[T]he Commission has already made a *generic* finding, in Order No. 99, that the incentive price is necessary under NGPA § 107(b)." FERC thus refused to consider the fact that circumstances had changed since it had issued Order No. 99 three years earlier, despite the fact that FERC itself had acknowledged the changed circumstances eight months earlier in its Incentive Limitation Notice.

On November 7, 1983, WBI timely petitioned FERC for rehearing of Order No. 338. On March 27, 1984, WBI filed a "Petition to Reopen Final Tight Formation Designation and Record to Jurisdictional Agency for Reconsideration."

Among other things, with respect to the lack of any need, under current market conditions, for incentive pricing, WBI pointed out that the market situation for gas had further deteriorated. With respect to the specific wells at issue, WBI noted that, even without incentive prices, these wells produced approximately $2.6 million per year in revenue while having cost a total of only $2.3 million to operate for all the years they had been in existence.

On June 12, 1984, WBI filed additional comments regarding the prior development of the subject area. Those comments advised FERC that drilling for twelve of the sixteen wells in the area had been completed *prior to* the recommendation to FERC by the jurisdictional agency that a tight formation designation be approved in order to provide incentives for drilling. Finally, WBI also stressed at this time that the drilling pattern of the wells should be considered an infill drilling pattern.

7. Other Government Agency Reports

During the pendency of the petition for reargument before FERC, reports issued by other U.S. government agencies clearly indicated that there was no longer any need for incentive pricing for natural gas such as that contemplated in the Order No. 338 and that such pricing had effects contrary to the purpose of the NGPA and contrary to the public interest.

a. *The DOE Reports*

Pursuant to § 123 of the NPGA, the Department of Energy submitted to Congress and the President two reports on, among other things, "natural gas prices, supplies, and demand and the competitive conditions and market forces in the natural gas industry in the United States." The first report, issued in July 1984 ("1984 DOE Report"), concluded that "[n]atural gas prices continue to be substantially above market-clearing levels because of federal regulation of the domestic gas market." 1984 DOE Report at 2. Specifically, the Report noted that, on average, high-cost gas, i.e., § 107(c)(5) or tight formation gas, was selling at prices between $5.00 and $6.00 per thousand cubic feet, well above the price of substitute fuels. *Id.* at 6-2. The 1984 DOE Report further stated that this price distortion has "encouraged many industrial gas users to switch to oil at a time when industrial gas use was already low due to economic conditions." *Id.* at 2. With respect to the effect of the continued use of incentive pricing under the NGPA on the consumer gas, the Report concluded:

> In addition, sizeable proved reserves of domestic low-cost gas will never be produced as a result of the price controls that remain in effect under the NGPA. These price controls cause low-cost gas reserves to be abandoned prematurely. As a result, partial decontrol under the NGPA will continue the unnecessary expenditures on high-cost domestic gas and expensive imported gas and oil.

Id. at 6-1.

The second DOE report, submitted in January 1985 ("1985 DOE Report"), while recognizing that the partial decontrol envisioned by the NGPA would eliminate some existing market distortions, concluded that remaining price controls, such as those found on the § 107(c)(5) tight formation gas at issue herein, will "continue to distort the domestic gas market. Price ceilings will prevent the gas market from adjusting efficiently to changing conditions. As a result, the market is likely to fluctuate between costly and inefficient shortages and surpluses." 1985 DOE Report at 109. *See also id.* at 121.

b. *The GAO Report*

As a result of separate requests for information by two Senators and one committee of the House of Representatives, the United States General Accounting Office issued a report on June 13, 1985 regarding Problems Identified in FERC's Incentive Pricing Program for Natural Gas from Tight Formations ("GAO Report"). The substance of the GAO Report, ignored by FERC in its Order Nos. 338 and 338-A, is in almost all respects material to the instant case. Based on a thorough investigation and analysis of FERC's use of the generic criteria of Order 99 for incentive pricing, the GAO Report reached three conclusions: (a) tight formations, including those in the area encompassing the formations at issue here, were not extraordinarily risky or costly to develop; (b) jurisdictional agencies had difficulty in applying FERC's qualifying criteria; and (c) much of the activity under Order No. 99 occurred outside high-potential areas.

8. FERC Order No. 338-A

Notwithstanding the foregoing, on November 6, 1985, FERC issued Order No. 338-A in which it denied WBI's request for rehearing. In issuing Order No. 338-A, FERC either glossed over or ignored: (a) the NGPA requirement to provide incentives only to the extent necessary; (b) FERC's own admissions in its Incentive Limitation Notice that the incentives it had been providing were not only unnecessary but harmful; (c) the GAO Report and the DOE Reports that the generic rules for incentive pricing in Order No. 99 were not providing incentives where they were needed and were, in fact, harming the gas market and gas consumers; and (d) the fact, recognized in the GAO Report, that the cost and production history of the area in which the subject formations were located demonstrated that there was no need for incentives to encourage development there. Rather, FERC dismissed these arguments with no substantive inquiry whatsoever, stating:

> In Order No. 99, the Commission made a generic finding that an incentive price is necessary under NGPA section 107(b), and thus is available to producers of gas from tight formations under section 107(c), provided the formation meets the standards set forth in the regulations, and provided that the producer is authorized by contract to collect the incentive rate. The Commission reaffirms its prior conclusion on this issue and declines to attempt to determine the need for incentive prices in individual cases where the applicable generic standards are satisfied.

33 FERC(CCH) at ¶ 61,373 (1985) (footnote omitted). On December 24, 1985, WBI appealed Order Nos. 338 and 338-A to the United States Court of Appeals for the District of Columbia, arguing that FERC's actions in issuing the orders were arbitrary and capricious.

9. The Court of Appeals Decision

The Court of Appeals did not address WBI's arguments. Instead, despite the contentions of the four participants in the appellate process—WBI, ARCO, FERC and the American Gas Association—the Court of Appeals held that it did not have jurisdiction to hear the appeal. The court held that, notwithstanding FERC's pronouncements and its long established practice of using § 501 rule making to designate tight formations, FERC was statutorily precluded from using that procedure and was required, instead, to use the procedure prescribed in § 503 which, until then, FERC had used only for step two well determinations.

As a consequence of its decision that only § 503 could be used for tight formation designations, the court held that FERC's role in designating tight formations was limited to determining whether substantial evidence supported the jurisdictional agency's decision (i.e., FERC could not consider information outside the record of the jurisdictional agency hearing). Although the orders at issue was clearly promulgated pursuant to § 501, the court treated them as though they had been issued under § 503 and, therefore, held that judicial review of FERC's decision would be available only if FERC reversed or remanded to the jurisdictional agency—not when, as here, FERC upheld the jurisdictional agency decision. WBI petitioned for rehearing of the court's decision and suggested rehearing en banc. The Court of Appeals denied the petition and suggestion by orders issued June 30, 1987.

ARGUMENT

By Erroneously Holding That It Lacked Jurisdiction to Review FERC Order Nos. 338 And 338-A, the Court Of Appeals Failed to Apply the Standards Set Forth by this Court to Determine Whether FERC'S Actions in Issuing those Orders Were Arbitrary and Capricious

In reviewing agency action in order to determine whether it is arbitrary and capricious, the function of the reviewing court

is to determine whether the agency engaged in thoughtful decision-making rather than mechanical order issuance:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (footnote omitted). Another way of articulating the same test is to say that the agency's action is measured by the end result, *i.e.*, whether the action is successful in protection of the public interest entrusted to it by Congress or whether that action produces arbitrary results. *Permian Basin Area Rate Cases*, 390 U.S. 747, 790, 791, 800 (1968).

In *Motor Vehicle Manufacturers Association v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), this Court set forth requirements for agency decision-making. Various insurance companies petitioned for review of an order of the National Highway Traffic Safety Administration ("NHTSA") rescinding crash protection requirements of Motor Vehicle Safety Standard 208 (i.e., mandatory installation of specialized seat belts or airbags in new motor vehicles). The Court stated that NHTSA acted arbitrarily and capriciously in rescinding that requirement, and that the agency failed to present an adequate basis and explanation for its decision. The Court held that NHTSA must either consider the matter further or adhere to or amend Standard 208 along the lines which NHTSA analysis supported.

The Court held that an

> . . . agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice

> made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 9 L. Ed.2d 207, 83 S. Ct. 239 (1962). In reviewing that explanation, we must "[consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, supra, at 285, 42 L. Ed.2d 447, 95 S. Ct. 438; *Citizens to Preserve Overton Park v. Volpe*, supra, at 416, 28 L. Ed.2d 136, 91 S. Ct. 814. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43.

FERC's application of Order No. 99 in the instant case was arbitrary and capricious for almost all of the reasons stated in *State Farm*. FERC entirely failed to consider important aspects of the problem it was called upon to decide, *i.e.*, the changing market for natural gas and the deleterious effect of continued incentive pricing on consumers. In light of the wealth of evidence FERC had before it and its own prior acknowledgement that incentive pricing was no longer necessary and, indeed, was harmful to the public interest, FERC's refusal, without any explanation, in Order Nos. 338 and 338-A, to reconsider the propriety of continued application of its generic rule for designating tight formations clearly ran counter to the evidence before the agency and can hardly be viewed as an exercise of agency expertise. Rather, it appears to have been a refusal by FERC to exercise its expertise.

FERC willfully ignored the fact that, in the two years since it had promulgated Order No. 99, demand for natural gas had declined while prices had risen to the point that they were in

excess of commodity value. The effect on natural gas prices of FERC's continued adherence to the standards set forth in Order No. 99 was, therefore, inconsistent with the intent of Congress in enacting the NGPA to insure "adequate supplies of natural gas at fair prices" and "commodity value pricing." *See Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409 (1986). FERC itself had acknowledged this fact in the Incentive Limitation Notice, characterizing the price situation created by Order No. 99 as "contrary to the public interest" and further stating that "incentive ceilings under NGPA section 107(c)(5) are exacerbating the current gas pricing problems." 48 Fed. Reg. 7469 (1983).

Instead of complying with its statutory mandate to permit higher prices only as "necessary to provide reasonable incentives," FERC was continuing to provide such incentives when they were no longer necessary. Further, despite FERC's obligation under §§ 4 and 5 of the NGPA, 15 U.S.C. § 717(c) and (d), to protect consumers, it was enforcing a generic rule that was admittedly contrary to the public interest by creating "still higher prices to residential and other customers."

Even if FERC's own statements in February 1983 were not sufficient to demonstrate that further adherence to Order No. 99 was arbitrary and capricious, it was certainly clear by the time the DOE Reports and the GAO Report were issued—prior to promulgation of Order No. 338-A—that further enforcement of Order No. 99 without regard to changed market conditions was arbitrary and capricious. The 1984 DOE Report indicated not only that demand had "steadily declined" since 1977 but that there was then a "supply surplus." Moreover, the 1984 DOE Report stated that this surplus was "largely the result of federal regulations", and referred to the high-cost gas incentives under the NGPA as "unnecessary expenditures" causing "low-cost gas reserves to be abandoned prematurely" and unnecessarily increasing prices to consumers. The 1984 DOE Report, issued approximately ten months before FERC issued Order No. 338-A, reiterated the findings of the 1984

DOE Report and stated categorically that price controls, such as those found on the tight formation gas, were continuing "to distort the domestic gas market."

The GAO Report made clear that special prices under Order No. 99 were in fact not necessary for drilling incentives; that tight formations were not particularly risky or costly to develop and that special prices were being approved for development of formations and areas that had "histories of increasing development before Order No. 99." Such a finding should have been particularly significant to FERC since the existence of extraordinary risk or cost was required by Congress for incentive pricing under 15 U.S.C. § 3317(b)(5), and thus expressly limited FERC's power to use it. Ignoring the statutory requirements of necessity and extraordinary cost or risk violated congressional intent to avoid windfalls or perverse incentives to producers and to encourage price declines in response to market conditions.

FERC's action in the instant case is a classic example of an administrative agency that ignored changed circumstances and failed to take a "hard look." FERC ignored the fact that its program of regulation was working at cross purposes with congressional intent to create incentives by pricing natural gas at its "commodity value." In so doing, FERC exacerbated a situation already acknowledged to be deleterious to consumers and the national economy. It is difficult to imagine any more arbitrary and capricious agency action than FERC's rote application of Order No. 99 in its issuance of Order Nos. 338 and 338-A.

CONCLUSION

This Court should issue a writ of certiorari because of the issues of importance this case raises for the administration of the NGPA. The Court of Appeals failed to correct FERC's arbitrary and capricious use of generic criteria set forth in Order Nos. 99 and 99-A to determine whether natural gas qualifies for incentive pricing—agency action which was directly contrary to the mandate of the NGPA and to the public interest which Congress sought to protect by enacting that statute.

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Respectfully submitted,

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